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No. 89-930

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, PETITIONER

v.

GENERAL RAILWAY SIGNAL COMPANY, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

WILLIAM W. THOMPSON, JR.
(Counsel of Record)
THOMPSON & WALDRON
1101 King Street, Suite 500
Alexandria, Virginia 22314
(703) 684-3340
Attorneys for Respondent

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In accordance with the Rules of the Court, Respondent submits the following Statement of the Case to correct omissions in Petitioner's Statement.

The issue presented by this petition is Respondent's entitlement to prejudgment interest awarded against Petitioner by the District Court for the District of Columbia under authority of D.C. Code Ann. § 15-109. The underlying dispute in this case centered on the proper amount of a credit to be given to Petitioner, Washington Metro-

politan Area Transit Authority ("WMATA"), for certain work which had been deleted from a construction contract between WMATA and Respondent, General Railway Signal Company ("GRS"). WMATA had unilaterally determined the amount of the credit to be $1,336,500 and, in 1979, had withheld that amount from progress payments otherwise due and owing to GRS. WMATA's calculation of the amount to be deducted was not based on the actual cost of the work. Instead, WMATA used a pricing approach which gave WMATA a net gain of approximately $965,000 which WMATA proposed to use for other purposes.

This strategy was summarized by WMATA's contract manager in a memorandum dated November 23, 1976,

> . . . our procedure should be to demand credit for deletions at bid prices *when favorable to* [*WMATA*]; let the contractor make his case, not us. In the meantime such credit is available in capital funds for other purposes. [Emphasis in original].

At the subsequent evidentiary hearing before the U.S. Corps of Engineers Board of Contract Appeals,[1] the author of this memo testified that WMATA adopted this strategy as a means of offsetting the tremendous costs that WMATA was incurring. (Tr. 224).[2]

GRS disputed the amount of the credit taken by WMATA, and the issue was presented to the Board of Contract Appeals. On December 30, 1983, after an evidentiary hearing and briefing, the Board issued a decision allowing a credit to WMATA of $1,403,325. On April 19,

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[1] The Corps Board has been designated by WMATA to hear appeals of contractors' claims. The Board performs this service pursuant to a contract between the Board and WMATA. The Board's involvement with WMATA contracts arises solely from this arrangement and is not a matter of statute or regulation.

[2] "Tr. —" refers to the transcript of the evidentiary proceedings before the Corp of Engineers Board of Contract Appeals.

1984, the Board's decision was adopted by WMATA's General Manager as WMATA's "final decision."[3] On June 4, 1984, GRS filed suit in United States District Court for the District of Columbia challenging the legality of WMATA's "final decision."

After considering cross-motions for summary judgment, the District Court concluded that WMATA's final decision was not supported by substantial evidence and was wrong as a matter of law. The Court granted GRS's motion and remanded the case to the Corps Board with instructions ". . . to calculate a reasonable *cost* estimate within 90 days, plus interest as provided by law." [Emphasis in original]. Order, dated November 14, 1984. WMATA appealed the order to the D.C. Circuit Court of Appeals. The appeal was subsequently dismissed as being premature. *Washington Metropolitan Area Transit Authority v. General Railway Signal Company*, D.C. Cir. No. 84-5900.

On March 29, 1985, the Corps Board, acting in response to the orders of the District Court, issued a second quantum decision reducing the amount of the credit from $1,403,325 to $360,548. In determining the reasonable cost of the deleted work, the Board used WMATA's own estimate of the cost with certain adjustments for redundant work.

Following its loss at the second Board proceeding, WMATA's attorneys prepared two memoranda.[4] The first

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[3] WMATA considers the Board's opinions to be merely advisory. WMATA's General Manager reserves the right to accept or reject any decision handed down by the Board. In many cases where the Board finds against WMATA, WMATA's trial attorneys, having lost at the Board, recommend to the General Manager that she not accept the Board's findings. The contractor must then pursue the matter in the courts.

[4] Copies of these memoranda were filed in the District Court proceedings on April 15, 1985.

memorandum concluded that the Board's second quantum decision was done merely to comply with the District Court's orders and did not change the underlying legal basis of the first Board decision. *Memorandum*, dated April 5, 1985, page 2. The second memorandum concluded that the District Court's remand to the Board was improper and based on an error of law. *Memorandum*, April 5, 1985, page 3. For these reasons, WMATA's attorneys recommended that WMATA reject the Board's second decision and reaffirm the Board's first decision which WMATA did on April 5, 1985.

On April 25, 1985, GRS filed a motion in District Court asking that judgment be entered against WMATA in accordance with the Board's second decision. In its motion, GRS also asked the Court to determine the amount of prejudgment interest since the Board had refused to do so. On May 29, 1985, the District Court filed a memorandum opinion and final order. In its opinion, the District Court adopted the Board's second decision as to the proper amount of the credit due for the deleted work. Because WMATA had withheld $1,336,500, the Court entered judgment against WMATA in the net amount of $975,952. In addition, the District Court awarded interest on that amount at the rate of 6% from April 17, 1984, the date of WMATA's first final decision, to May 29, 1985, the date of the Court's order. The interest thus calculated came to $65,295.20.

Both parties appealed to the D.C. Circuit. The balance of the procedural history of the matter is set out in WMATA's petition. The chronology of the case is summarized below.

Chronology

Money withheld	January 17, 1979
First Board Decision	December 30, 1983
First WMATA Final Decision	April 19, 1984
First District Court Order	November 14, 1984

First Appeal to Circuit Court	1984
Second Board Decision	March 29, 1985
Second WMATA Final Decision	April 5, 1985
Second District Court Decision	May 29, 1985
First Circuit Court Decision	August 21, 1987
First Petition for Rehearing	September 21, 1987
Second Circuit Court Decision	May 12, 1989
Second Petition for Rehearing	June 12, 1989
First Petition for Certiorari	December 10, 1989

REASONS FOR DENYING THE WRIT

I. There Is No Conflict Between the Decision In This Case and the Decision in *Langenfelder*, and the Decision In This Case Is In Accord With District of Columbia Law.

WMATA argues that the D.C. Circuit has failed to conform its holding in this case with the holding of the D.C. Appeals Court in *District of Columbia v. C.J. Langenfelder & Son*, 558 A.2d 1155 (D.C. 1989). There is, however, no conflict between the two decisions. WMATA's contentions on this point gloss over an important and fundamental difference between the two cases.

Courts dealing with construction contracts in general, and with public contracts in particular, recognize two types of disputes. The first is the so-called "arising under" type where the dispute in question is said to have arisen under some remedy-granting provision of the contract such as the "Changes" clause, the "Changed Conditions" clause, or the "Suspension of Work Clause." [5] Such claims are normally redressed under the "equitable adjustment" language which is at issue here. In the case of "arising under" claims, the contractor must continue working while the claim is being resolved.

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[5] These are standard clauses that often appear in various forms in construction contracts.

The second type of dispute is a pure breach of contract. In the case of a breach, the contractor may discontinue work and avail himself of the common law remedies for breach.

The *Langenfelder* case involved an "arising under" type of dispute where the contractor was seeking relief under the "Changes" clause and its "equitable adjustment" provision. "As a preliminary matter, we note that the dispute between Langenfelder and the District arises under the contract and is not in the nature of a breach of contract." *Langenfelder*, 558 A.2d at 1159. Under the facts in *Langenfelder*, the D.C. Appeals Court held that the contractor could not collect prejudgment interest as part of an "equitable adjustment." [6]

The *Langenfelder* case was not a breach case. On the contrary, the court carefully distinguished its holding in *Langenfelder* from the earlier decision in *Kenny Construction Co. v. District of Columbia*, 262 F.2d 926 (D.C. Cir. 1959) which was a breach case. "The action in *Kenny Construction* was based on a breach of contract and was not an action arising under the contract . . . ." *Langenfelder*, 558 A.2d at 1161. In *Kenny*, the court held that the D.C. government was liable for prejudgment interest in a case of breach. *Kenny*, 262 F.2d at 930.

The *General Railway Signal* case at issue here is not an "arising under" case, but a case of breach. The D.C. Code Ann. § 15-109 states,

> In an action to recover damages for breach of contract the judgment shall allow interest on the amount for which it is rendered from the date of judgment

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[6] The holding in *Langenfelder* is based on the Court's opinion as to the meaning "equitable adjustment" had in 1968 when the Langenfelder-District of Columbia contract was signed. As such, it is limited by its own terms to contracts of that vintage. *Langenfelder*, 558 A.2d at 1163.

> only. This section does not preclude the jury, or the court, if the trial be by the court, from including interest as an element in the damages awarded, if necessary to fully compensate the plaintiff.

Under the facts in this case, the D.C. Circuit found two independent bases for the award of prejudgment interest. One basis was the "equitable adjustment" language as used in the GRS-WMATA contract, but the second was WMATA's breach of that contract. "In the present case, Section 15-109 is plainly applicable. The equitable adjustment provision imposed a contractual duty on WMATA which it allegedly breached in 1979 by withholding an excessive amount of progress payments." *General Railway Signal*, App. at 18a.

Having breached its contract, WMATA became liable for prejudgment interest just as the D.C. government did in the *Kenny* case. Here, the D.C. Circuit allowed the trier of fact to award interest on the damages caused by WMATA's breach of the contract. As such, the *General Railway Signal* holding conforms to the decisions in both *Langenfelder* and *Kenny*. The D.C. Circuit followed the applicable District of Columbia decisional and statutory law. There is no need to grant WMATA's petition because there is simply no conflict among these decisions.

II. This Court's Holding In *Library of Congress v. Shaw* Applies Only To The United States Government And Does Not Extend To The Creatures Of Interstate Compacts Such As WMATA.

WMATA's second argument is based on this Court's decision in *Library of Congress v. Shaw*, 478 U.S. 310 (1986), a case which held that the United States government is immune from interest unless there has been an express congressional consent to the award of interest separate from a general waiver of immunity from suit. *Shaw*, 478 U.S. at 314. The holding is based on the federal government's long history of immunity from inter-

est awards, a history codified at 28 U.S.C. § 2516(a). *Shaw*, 478 U.S. at 317.

WMATA argues that the "equitable adjustment" language of the GRS contract does not rise to the level of the express waiver required by *Shaw*. In making that argument, WMATA puts its trolley before its horse. It assumes first, that WMATA has sovereign immunity in contract matters, and second, that the contract between the parties is the only possible way that immunity can be waived. Neither assumption is correct.

Before it can sneak into the shadow of *Shaw*, WMATA must show that it is a sovereign power entitled to the same immunities as the United States. Such sovereigns are *avis rara*, and WMATA flys with a different flock. WMATA is the creature of an interstate compact. It sprang full-grown, with the consent of Congress, from the pens of its founding signatories. It has no ancient history against the imposition of interest, nor does it enjoy the protection of any statutory prohibition on interest.[7]

WMATA has only the powers and immunities set out in the eight corners of the enabling compact. *See, Lake County Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979). Any intent by Congress or the founding signatories to transfer immunities to an interstate compact must be manifest from the language and the structure of the compact. *Morris v. Washington Metropolitan Area Transit Authority*, 781 F.2d 218, 224 (D.C. Cir. 1986). Section 80 of the Compact which created WMATA states,

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[7] In *Langenfelder*, the District government conceded that federal law decisions on interest were not directly controlling since such decisions are based in part on the common law and statutory prohibition of the allowance of interest against the United States. *Langenfelder*, 558 A.2d at 1160.

> The Authority shall be liable for its contracts and for its torts and those of its Directors, employees and agent [sic] committed in the conduct of any proprietary function, in accordance with the law of the applicable signatory (including rules on conflict of laws), but shall not be liable for any torts occurring in the performance of a governmental function. The exclusive remedy for such breach of contracts and torts for which the Authority shall be liable, as herein provided, shall be by suit against the Authority.[8]

D.C. Code Ann. § 1-2431.

The language could hardly be clearer; WMATA has never had the protection of sovereign immunity in contract matters. When WMATA is performing a governmental function, such as policing its facilities, it has immunity for its torts. *Morris*, 781 F.2d at 220. When it is performing a proprietary function, such as contracting for goods and services, it is liable for its breaches in accordance with the law of the applicable signatory. *Qasim v. WMATA*, 455 A.2d 904 (D.C. App. 1983), *cert. denied*, 461 U.S. 929 (1983).

Assuming, *arguendo*, that WMATA was given some shred of immunity in contract matters, it waived that immunity when it breached its contract with GRS. Here, the applicable signatory referred to in the Compact is the District of Columbia. D.C. law permits the trier of fact to award prejudgment interest where necessary to fully compensate the plaintiff. D.C. Code § 15-109, *supra*. That is precisely what the D.C. Circuit Court allowed in this case.

Section 80 of the Compact is, on its face, a complete and unambiguous withholding of immunity in cases of breach. Even if it were read to confer on WMATA the

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[8] Section 81 of the Compact gives the United States District Courts original jurisdiction, concurrent with the courts of Maryland, Virginia, and the District of Columbia, of all actions brought by or against WMATA.

same immunity as enjoyed by the District of Columbia, the result would be no different. The District government has no immunity from the award of prejudgment interest in breach of contract cases. *Kenny, supra*; *District of Columbia v. Pierce Asso. Inc.*, 527 A.2d 306, 312 (D.C. 1987); *District of Columbia v. Potomac Electric Power Co.*, 402 A.2d 430, 441 (D.C. 1979). In *Langenfelder*, the District government acknowledged that it did not have immunity from the imposition of prejudgment interest. *Langenfelder*, 558 A.2d at 1167.

The fact of the matter is that prejudgment interest has routinely been awarded against WMATA in breach of contract cases.[9] *General Railway Signal v. WMATA*, 527 F.Supp. 359, 361 (D.D.C. 1979), *aff'd*, 664 F.2d 296 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 915 (1981) (prejudgment interest available under D.C. Code § 15-109 for WMATA's breach of contract disputes procedure); *Nello L. Teer Co. v. WMATA*, No. 87-2997-OG (D.D.C. Oct. 30, 1989) (prejudgment interest available under D.C. Code § 15-109 for WMATA's breach of contract disputes procedure); *Granite-Groves v. WMATA*, 845 F.2d 330, 343 (D.C. Cir. 1988) (prejudgment interest allowed on damages where WMATA delayed processing contractor's claims). Even WMATA's chosen Board of Contract Appeals has held that it has the power, as the "trier of fact", to award prejudgment interest. *Square Construction Company*, ENG BCA No. 3841, 78-2 BCA (CCH) ¶ 13,267; *Rohr Industries*, ENG BCA No. 4306, 83-1 BCA (CCH) ¶ 16,299.

The holding in *Shaw* is limited to the United States government, or at least, to entities with similar his-

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[9] Similarly, attorneys' fees, which are traditionally barred by sovereign immunity, have been imposed against WMATA in contract cases. *Square Construction Co. v. WMATA*, 800 F.2d 1256 (4th Cir. 1986) (having lost on the merits, contractor nevertheless entitled to attorneys' fees because WMATA withheld evidence during discovery prior to Board hearing).

tories of immunity. WMATA, however, has never been given immunity in contract matters. Obviously, *Shaw* cannot be read to protect an immunity that never existed.

WMATA's petition ends with an impassioned plea for the Court to protect the taxpayers from the economic consequences of WMATA's breaches of contract. In this case, WMATA has been ordered to pay $65,000 for improperly withholding $975,000 from a contractor for six years. This equates to an effective interest rate of 1% per year. To get even this paltry sum, GRS had to embark on an odyssey involving two trips to the Board, two trips to the District Court, three trips to the Circuit Court, including two petitions for rehearing, and now a petition for certiorari. It would appear that the strategy set out in WMATA's memorandum of 1976, *supra*, has succeeded admirably, and the taxpayers may feel secure in their pocketbooks.

CONCLUSION

The D.C. Circuit correctly applied D.C. law to the facts of this case. There is no conflict in the *General Railway Signal* and *Langenfelder* decisions. This Court's holding in *Shaw* is limited to the United States government. The petition should therefore be denied, and GRS should be awarded the costs of this proceeding, including attorneys' fees.

Respectfully submitted,

WILLIAM W. THOMPSON, JR.
(Counsel of Record)
THOMPSON & WALDRON
1101 King Street, Suite 500
Alexandria, Virginia 22314
(703) 684-3340
Attorneys for Respondent

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